IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 56800-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
WILLIAM R. COGGIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: August 7, 2006
	)	
	)	

PER CURIAM – The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense.[1] William Coggin was convicted of first degree robbery and second degree assault, for the single act of pointing a gun at his victim during a robbery. At sentencing, the State conceded that these two convictions should merge for sentencing purposes. But the judgment and sentence does not reflect that the court vacated the second degree assault conviction. Accordingly, we accept the State's concession of error on appeal and vacate the second degree assault conviction. But we conclude that comments made by the State during closing argument did not constitute prosecutorial misconduct. We affirm all convictions except the second degree assault conviction, which we vacate,

[1] State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005), review granted, 156 Wn.2d 1010 (2006).

and remand for further proceedings.

On August 23, 2005, two sisters, K1 and K2,[2] were at home when Coggin came to the door to ask if there was yard work for him to do. K1 said no, and Coggin returned to his van. Coggin then returned to the house with a board displaying keychains and asked if they would like to buy any. When K1 refused, Coggin pulled out a gun, entered the house and raped the two sisters. Coggin then went with the girls upstairs to take items from the bedrooms. At that point, a third sister, K3, arrived home and opened the front door. K2 shouted to her that there was a robber in the house. Coggin ran down the stairs towards K3, pointing a gun at her. The girls' parents then entered the house, and were ordered upstairs at gunpoint by Coggin, who then left.

Coggin was arrested after a police officer recognized the keychain board Coggin had left at the house. The jury convicted him of one count of first degree burglary, four counts of first degree rape of K1 and K2, one count of second degree assault of K3, five counts of first degree robbery of the five members of the family, two counts of first degree unlawful possession of a firearm, and eleven firearm allegations.

Coggin appeals.

Merger

Coggin argues, and the State properly concedes, that his conviction for

[2] We refer to three of the victims in this case as K1, K2 and K3 as they are minors within the same family, each with first names beginning with K.

second degree assault of K3 violates double jeopardy and must be vacated.

Merger issues involve questions of law that we review de novo.[3] We use the merger doctrine to determine when the legislature intends to apply multiple punishments to particular offenses.[4] The Washington Supreme court held in State v. Freeman that, because of the absence of contrary legislative intent, where second degree assault is charged to elevate robbery to the first degree, the two convictions merge and the remedy is to vacate the conviction on the lesser offense.[5] We are concerned here with only the latter question.

Here, to prove first degree robbery as charged and proved by the State, the State had to prove Coggin assaulted K3 in furtherance of the robbery.[6] Coggin was convicted separately of second degree assault and first degree robbery for pointing a gun at K3 during the robbery. At sentencing, the prosecutor conceded that the convictions merged and no sentence was imposed for the assault itself. Nevertheless, the judgment and sentence reflected both

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[3] State v. Zumwalt, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), aff'd sub nom, State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

[4] State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999).

[5] Freeman, 153 Wn.2d at 778; Weber, 127 Wn. App. at 885.

[6] RCW 9A.56.200 states:

Robbery in the first degree:

(1) A person is guilty of robbery in the first degree if:
(a) In the commission of a robbery or of immediate flight therefrom, he or she:
(i) Is armed with a deadly weapon; or
(ii) Displays what appears to be a firearm or other deadly weapon; or
(iii) Inflicts bodily injury; . . .

convictions. We accept the State's concession that the merger rule does apply and the assault conviction must be vacated.

We remand to the trial court to correct the judgment and sentence and warrant for commitment accordingly. The State contends that on remand, the amended judgment and sentence should reflect the guilty verdict on the assault charge. The State is correct that a judgment and sentence may reflect a guilty charge on a merged conviction, but the judgment and sentence must clarify that the two merged charges constitute only one conviction.[7] The other corrections to the judgment and sentence that the State proposes in its brief on appeal appear to be proper.

Prosecutorial Misconduct

Coggin also argues that the prosecutor committed misconduct in his closing by arguing that Coggin's intent to commit the burglary could be inferred from the fact that he moved the van for a quick getaway. Coggin claims this assertion is unsupported by the evidence at trial. We disagree.

Prosecutorial misconduct may violate a defendant's due process right to a fair trial.[8] To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.[9] In closing argument, a

[7] State v. Johnson, 113 Wn. App. 482, 488, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010 (2003) (judgment and sentence clearly stated that the two guilty verdicts constituted only one conviction).

[8] State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

[9] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence.[10]

In arguing the intent element for burglary in the first degree, the prosecutor stated:

> So what did he do when he couldn't get inside in that fashion and they didn't want to have him do any work? He left and he moved his van so that he was parked down the driveway so he could make a speedy get away. I'll have you think about that when talking about intent, intent to commit a crime because that's one of the elements.
> What do we have? He moved his car and comes back with this ruse, this ruse of asking if they want to buy any of these. . . .[11]

Coggin argues that the prosecutor's argument was improper because there was insufficient evidence that Coggin moved his van. But Coggin overlooks substantial testimony supporting the prosecutor's statements. K2 testified that she initially saw Coggin's van parked facing the house, and both K1 and K2 testified that after Coggin left for the first time, they heard a car door close. The girls' mother testified that as she drove towards the house she saw the van parked downwards, away from the house. This testimony indicates that Coggin moved the van between the first time he went to the front door of the house and the second time. Thus the testimony supported the fact that Coggin moved the van, and the inference that he did so in order to make a quick get away was reasonable. The prosecutor's comments were not misconduct.

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[10] State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012 (1996).

[11] Report of Proceedings (June 29, 2005) at 276.

Therefore, we need not address prejudicial effect, the second prong of the test.

We affirm all convictions except for the second degree assault, which we vacate, and remand for further proceedings.

For the Court: